Supreme Court, U.S.
FILED
02 550 OCT 7 - 2002
OFFICE OF THE CLERK

(1)

No. 02-

IN THE

Supreme Court of the United States

R. DALE STERRITT, JR.; RICHARD D. STERRITT, SR.; LARRY STERRITT; STERRITT PROPERTIES, INC.; and 20TH CENTURY HOLDINGS, INC.,

Petitioners,

v.

CONTINENTAL INVESTMENT CORPORATION, and STEWART RAHR, in his own right and in the right and on behalf of Continental Investment Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER M. WEIL
WEIL & PETROCCHI, P.C.
1900 Thanksgiving Tower
1601 Elm Street
Dallas, TX 75201
(214) 969-7272

EMIL LIPPE, JR.
Counsel of Record
LAW OFFICES OF LIPPE & ASSOCIATES
2001 Bryan Street, Suite 1850
Dallas, TX 75201
(214) 855-1850

JEFFREY W. HELLBERG, JR.
ARTER & HADDEN, LLP
1717 Main Street, Suite 4100
Dallas, TX 75201
(214) 761-2100

Attorneys for Petitioners

176620

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

59 PP

QUESTIONS PRESENTED FOR REVIEW

The questions presented in this case, in which judgment was rendered against the Petitioners and other defendants for $233,584,228.98, plus costs of court, based upon findings of securities fraud involving purchases of stock in a publicly-held company, are as follows:

1. In the absence of any promulgated standards for District Courts to follow in determining trial time allocation in timed trials, were Petitioners denied Due Process of Law by the District Court's imposition of arbitrary time allocations and limitations in the presentation of evidence and argument, which were inconsistently and arbitrarily applied, including:

   the initial ruling that the central defendant in an alleged conspiracy could not participate in the trial, denial of his motion for reconsideration, and then reversal of such ruling without warning at the beginning of trial;

   allowance of too little trial time to defendants as a whole to defend themselves in a two week trial, with a complaint 90 pages in length, containing 20 counts and 265 numbered paragraphs, with over 1000 Plaintiffs' exhibits, and allocation of trial time on a *per capita* basis among the defendants in a conspiracy trial, without weighting the time according to which were the primary defendants, which resulted in allowing only 107 minutes for Petitioner Dale Sterritt, the primary defendant; and

changing the time allocation rules on several occasions, including denial of adequate time for closing argument, giving Petitioners only 20 minutes to respond to 70 minutes of the Plaintiffs' argument, with a 77 page jury charge, and over 1000 trial exhibits, not even allowing Petitioners to utilize the portions of their meager time allotments which they had conserved in reliance upon the District Court's initial ground rules?

2. In an action under the antifraud provisions of the Federal Securities Laws, should a plaintiff be allowed to recover damages for purchases of securities in reliance upon material nonpublic misrepresentations, which contradict the disclaimers and cautionary disclosures in the public filings of the issuer concerning the identical material issues, thereby essentially rewarding him for insider trading?

STATEMENT PURSUANT TO RULE 29.6

Both Sterritt Properties, Inc., and 20th Century Holdings, Inc., are 100% owned by Sara Family, Ltd. There is no parent corporation for Sara Family, Ltd., and no publicly held company owns 10% or more of the stock of Sara Family, Ltd.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
STATEMENT PURSUANT TO RULE 29.6	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	viii
TABLE OF APPENDICES	xiv
CITATIONS TO REPORTS OF OPINIONS TO BE REVIEWED	1
STATEMENT OF THE BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	3
Course of Proceedings and Disposition in Lower Court	3
STATEMENT OF FACTS	3
Parties	3
Rahr purchases of Continental Stock in reliance upon Nonpublic Information	4
Procedural History of the Lawsuit	6

Contents

	Page
REASONS FOR GRANTING THE PETITION ...	6
I. PETITIONERS WERE DENIED A FAIR TRIAL BY THE ARBITRARY TIME LIMITATIONS IMPOSED BY THE TRIAL COURT AND THE COURT'S REFUSAL TO FOLLOW ITS OWN RULES	6
A. The trial court imposed arbitrary time limitations which made a fair trial impossible in this complex case	6
1. The time allotted for discovery was unfairly limited	6
2. The time allocations and rulings denying trial participation at the pretrial conference were arbitrary and unreasonable	7
B. The last-minute reconsideration by the District Court at the beginning of trial materially changed the time allocation in an arbitrary and unfair manner	9
1. The District Court suddenly changed the rules at the very beginning of trial, and re-allocated the time for Defendants	9
2. *Per capita* allocation of time among Defendants in a conspiracy trial was manifestly prejudicial and unfair to Dale Sterritt, the central Defendant.	10

Contents

Page

3. The reallocated time was absolutely inadequate for Petitioners to defend themselves. 11

C. The increase of 80 minutes of allotted time to Dale Sterritt after the Plaintiffs rested was insufficient to cure the prejudice suffered 14

D. Changing the previously-announced time allocation rules for closing argument was a further denial of due process 15

E. The arbitrary and unfair time allocation caused fatal prejudice to Petitioners' ability to defend themselves 19

F. Petitioners preserved the time allocation complaint 21

G. The usage of "timed trials" and their impact upon fundamental Due Process rights is a matter that justifies review by this Court pursuant to Rule 10(c), SUP. CT. R. 22

II. RESPONDENTS COULD NOT LAWFULLY RECOVER DAMAGES FOR SECURITIES FRAUD BASED UPON ALLEGED MISREPRESENTATIONS WHICH CONTRADICTED CAUTIONARY STATEMENTS IN THE PUBLIC FILINGS OF CONTINENTAL 25

Contents

Page

A. The key alleged misrepresentations relied upon were the subject of express cautionary statements in the publicly-filed disclosures of Continental 25

B. Appropriate disclaimers of uncertainty, included in public filings, rendered reliance upon the key alleged representations unreasonable as a matter of law 27

C. Denial of recovery for security fraud to persons who have relied upon nonpublic misrepresentations contradicting public disclosures is of critical importance to the securities markets 29

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases

Bateman Eichler v. Berner, 472 U.S. 299 (1985) .. 27, 29

Ben E. Keith Co. v. Lisle Todd Leasing, Inc., 734 S.W.2d 725 (Tex. App. – Dallas 1987, *writ ref'd., n.r.e.*) 26

Callip v. Harris Co. Child Welfare Dept., 757 F.2d 1513 (5th Cir. 1985) 9

Charter v. Chleborad, 551 F.2d 246 (8th Cir. 1977), *cert denied*, 434 U.S. 856 22

Cooper v. Robischung Bros., 155 S.W. 1050 (Tex. Civ. App. – Galveston 1913, *writ dism'd*) 17, 18

Dallas Railway & Terminal Co. v. Aultman, 253 S.W.2d 900 (Tex. Civ. App. – Dallas 1952, *no writ*) 17

Dominguez v. Trent, 836 S.W.2d 677 (Tex. App. – El Paso 1992, *no writ*) 26

Freehill v. Lewis, 355 F.2d 46 (4th Cir. 1965) 7

Frisone v. U.S., 270 F.2d 401 (9th Cir. 1959) 22

Greatreaks v. U.S., 211 F.2d 674 (9th Cir. 1954) ... 22

In re NLO, Inc., 5 F.3d 154 (6th Cir. 1993) 7

Isquith v. Middle South Utilities, Inc., 847 F.2d 186 (5th Cir. 1988) 25, 27, 28, 29

Cited Authorities

	Page
Krim v. BancTexas Group, 989 F.2d 1435 (5th Cir. 1993)	28-29
Lulirama Ltd. v. Axcess Broadcast Services, 128 F.3d 872 (5th Cir. 1997)	26
May v. Hahn, 54 S.W. 416 (Tex. Civ. App. – Dallas 1899, *no writ*)	17
McFarland v. Haby, 589 S.W.2d 521 (Tex. Civ. App. –Austin 1979, *writ ref'd., n.r.e.*)	26
Mercury Air Group v. Mansour, 237 F.3d 542 (5th Cir. 2001)	27, 28, 29
Mercury Life & Health Co. v. Hughes, 271 S.W.2d 842 (Tex. Civ. App. – San Antonio 1954, *writ ref'd.*)	26
Mitchell v. Robinson, 162 S.W. 443 (Tex. Civ. App. – Galveston 1913)	17
Nesbitt v. Walters, 35 Tex. 576 (1873)	17
Nix v. Whiteside, 475 U.S. 157 (1986)	13
Pinter v. Dahl, 486 U.S. 622 (1988)	27, 29
Pirrung v. Texas & N.O.R.R. Co., 350 S.W.2d 50 (Tex. Civ. App. – Houston 1961, *no writ*)	17
Plumlee v. Paddock, 832 S.W.2d 757 (Tex. App. – Fort Worth 1992, *writ denied*)	26

Cited Authorities

Page

Price v. McGlathery, 792 F.2d 472 (5th Cir. 1986) 9

Rosiello v. Sellman, 354 F.2d 219 (5th Cir. 1965) .. 18

Rubinstein v. Collins, 20 F.3d 160 (5th Cir. 1994) 27, 28

Ruiz v. Estelle, 679 F.2d 1115, *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) 13

SEC v. Hurton, 739 F. Supp. 704 (D.Mass. 1990) ... 27

SEC v. Stephenson, 720 F. Supp. 370 (S.D.N.Y. 1989) 27

Sims v. ANR Freight System, Inc., 77 F.3d 846 (5th Cir. 1996) 12, 13, 14

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911) .. 24

Transamerica Computer v. International Business Machines Corp., 573 F.2d 646 (9th Cir. 1978) 7

United States v. Bryan, 58 F.3d 933 (4th Cir. 1995) 27

United States v. Garrett, 238 F.3d 293 (5th Cir. 2000) 8

Cited Authorities

Page

United States v. Gray, 105 F.3d 956 (5th Cir. 1997) 14, 17, 18

United States v. Ruggiero, 56 F.3d 647 (5th Cir. 1995), *cert. denied*, 516 U.S. 951 27

Constitutional Provision

Constitution of the United States, Amendment V .. 1, 12

Statutes

Securities Exchange Act of 1934, generally 15 U.S.C. § 78t-1 ..... 1, 26-27

15 U.S.C. § 77z-1(b)(1) 6

15 U.S.C. § 78u-1 ..... 2, 26

15 U.S.C. § 78u-4(b)(3)(B) 6

28 U.S.C. §§ 471-482 23

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 3

28 U.S.C. § 1331 3

Safe Harbor Rules for Projections, Securities Act Release No. 6084 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,117 (July 5, 1979) 28

Page

Exchange Act Rule 3b-6, 17 C.F.R. § 240.3b-6 (1987) 28

Securities Act Rule 175, 17 C.F.R. § 230.175 (1987) 28

Rules

Advisory Committee Notes to the 1993 Amendments to Rule 16, FED. R. CIV. PROC. 8

Federal Rules of Civil Procedure, generally Rule 26, FED. R. CIV. PROC. 7

Rule 103, FED. R. EVID. 21

Rule 10(c), SUP. CT. R. 22

Texts and Treatises

Civil Litigation Management Manual, Judicial Conference of the United States, Committee on Court Administration and Case Management (2001) 24, 25

The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook, Federal Judicial Center, David Rauma & Donna Stienstra (1995) 23

The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials, 26 U.S.F.L.Rev. 237 (1992) 23

Cited Authorities

Page

Long Range Planning: A Reality in the Judicial Branch, 44 Am.U.L.Rev. 1599 (1995) 23

Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion, 22 Hofstra L.Rev. 567 (1994) 23

"Times are Changing for Trials in Court," 21 Fla.St.U.L.Rev. 1 (1993) 23

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed June 7, 2002 ..... 1a

Appendix B — Final Judgment Of The United States District Court For The Northern District Of Texas, Dallas Division Dated And Filed July 10, 2000 And Entered July 11, 2000 ..... 5a

Appendix C — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petitions For Rehearing Dated And Filed July 8, 2002 ..... 12a

Petitioners R. Dale Sterritt, Jr. ("Dale Sterritt"), and Richard D. Sterritt, Sr., Larry Sterritt, Sterritt Properties, Inc. and 20th Century Holdings, Inc. ("the RDSSR group"), hereby file this their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and state the following:

CITATIONS TO REPORTS OF OPINIONS TO BE REVIEWED

The decisions of the Court of Appeals, and of the District Court, herein are unreported and are reproduced in Appendix A and B, respectively

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered June 7, 2002, and the Motions for Rehearing of Petitioners were denied July 8, 2002. (App. C). This Court has jurisdiction of this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

Constitution of the United States, Amendment V

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Securities Exchange Act of 1934

> 15 U.S.C. Sec. 78t-1. Liability to contemporaneous traders for insider trading
>
> (a) Private rights of action based on contemporaneous trading
>
> Any person who violates any provision of this chapter or the rules or regulations thereunder by

purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

* * *

(c) Joint and several liability for communicating

Any person who violates any provision of this chapter or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) of this section with, and to the same extent as, any person or persons liable under subsection (a) of this section to whom the communication was directed.

. . . .

15 U.S.C. Sec. 78u-1. Civil penalties for insider trading

(a) Authority to impose civil penalties

(1) Judicial actions by Commission authorized

Whenever it shall appear to the Commission that any person has violated any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) while in possession of material, nonpublic information in, or has violated any such provision by communicating such

> information in connection with, a transaction on or through the facilities of a national securities exchange or from or through a broker or dealer, and which is not part of a public offering by an issuer of securities other than standardized options or security futures products, the Commission —
>
> > (A) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation; and
> >
> > (B) may, subject to subsection (b)(1) of this section, bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by a person who, at the time of the violation, directly or indirectly controlled the person who committed such violation.
>
> . . . .

STATEMENT OF THE CASE

Course of Proceedings and Disposition in Lower Court

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction of an appeal from a final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF FACTS

Parties

Continental Investment Corporation ("Continental") is a company involved in the waste disposal business. (Plaintiffs'

Exhibit, hereafter "PX" 17). Continental's stock was publicly traded but not listed on any exchange or with NASDAQ.

Dale Sterritt was President and Chief Executive Officer of Continental, with Sterritt Properties, Inc., the largest shareholder of Continental. (PX-42). Much of the assets of the extended Sterritt family were invested in Continental stock. (Second Supplemental Record, hereafter "S.R.2", Vol. 8 at 727-728, Vol. 9 at 978).

Stewart Rahr ("Rahr") is a wealthy, self-made man who dropped out of law school to take over a struggling family business which wholesaled pharmaceuticals and medical supplies in the New York City area, and built it up into a multimillion dollar company, with annual sales over $1.5 billion. (S.R.2, Vol. 8 at 681-683).

Rahr purchases of Continental Stock in reliance upon Nonpublic Information

Beginning on October 13, 1995, Rahr began purchasing shares of stock in Continental, (RR Vol. 5, p. 786:2-6; PX 81.) based upon nonpublic representations by Dale Sterritt to Rahr and his son that Continental would be listed on NASDAQ and a quarry that it owned would be turned into a landfill. (RR Vol. 5, pp. 692:12-16; pp.792:21-23.) Rahr testified repeatedly that these were the key representations upon which he relied. (S.R.2, Vol. 8 at 692-694, 695, 699, 749-756; PX-69).

The documents that Rahr reviewed prior to investing in Continental were the 1994 10-K and the Rinfret Report. (S.R.2, Vol. 8 at 698; PX-69). Peter Rinfret, an attorney for whom Rahr's son worked, had analyzed Continental for investment on Rahr's behalf. (S.R.2, Vol. 8 at 698; PX-69). Rahr's son had helped in writing the report. (S.R.2, Vol. 8 at 754). The Rinfret report warned of obstacles to permitting, and that political opposition

might prevent success in obtaining the permit. (S.R.2, Vol. 8 at 754-758).[1] Another analysis also warned of the same risks.[2]

The risks and uncertainties of using the site for waste disposal were extensively discussed in the public filings of Continental. The June 30, 1994, 10-Q (PX-6) disclosed that public opposition and compliance with regulatory requirements would impact final approval and installation. The 1994 Form 10-K (PX-8) disclosed (1) the likelihood of political opposition to permitting, (2) stringent environmental regulations (pp.2-4), (3) provided a detailed discussion of business risks including extensive regulatory and financial requirements, and the likely delays from political opposition (pp 6-11), and (4) included an accountant's letter expressing doubt that the company would be a going concern (p.F-1 and Note C).

The 1995 Form 10-KSB (PX-7) disclosed: (1) the need to obtain Special Use permits, the approval of which was not certain (p.4), (2) discussed the same business risks as in the 1994 Form 10-K (pp.6-13), (3) disclosed that the working capital deficit of the company had increased substantially from the prior year, and that without additional funds, it would be necessary to delay development of the site due to the lengthy and costly approval process (p. 16), and (4) also included an accountant's letter with a "going concern" reservation. (p. F-1 and Note C). These cautionary disclosures continued through the 1996 and 1997 public filings of Continental. (PX-728, PX-821).

---

1. The report warns that other landfills had closed due to stringent regulations, and that a $1.5 million bridge loan was needed to facilitate approval of the NASDAQ application.

2. The report of Hempstead & Co., assessing the fair market value of Continental as of May 27, 1997. (PX-69), discussed environmental regulations, and the risks entailed, in great detail, (*Id.* at 10-12, 44), and observed that Continental would incur substantial costs in developing the proposed landfill which could not be estimated with certainty. (*Id.* at 12).

Procedural History of the Lawsuit

The underlying suit was originally filed in the United States District Court for the Eastern District of New York (AR Vol. 21, p. 6), later amended to join the RDSSR group, along with 80 other defendants, (AR Vol. 21, p. 28), then removed to Bankruptcy Court in the Northern District of Texas (*See* AR Vol. 1, p. 1), and the reference withdrawn. (AR Vol. 1, p. 42, p. 69).

REASONS FOR GRANTING THE PETITION

I. PETITIONERS WERE DENIED A FAIR TRIAL BY THE ARBITRARY TIME LIMITATIONS IMPOSED BY THE TRIAL COURT AND THE COURT'S REFUSAL TO FOLLOW ITS OWN RULES

A. The trial court imposed arbitrary time limitations which made a fair trial impossible in this complex case

1. The time allotted for discovery was unfairly limited

Plaintiff Stewart Rahr filed his Third Amended Complaint on September 7, 1999, (AR Vol. 15), and his Complaint in Intervention on behalf of Continental on September 8, 1999. (AR Vol. 7, p. 1597). Petitioners filed Motions to Dismiss the Third Amended Complaint. (S.R. Vol.8, p.1941, Vol. 11, p. 2569, 2587). Since the claims involved claims under the Federal Securities Laws, pursuant to 15 U.S.C. §77z-1(b)(1) and 15 U.S.C. §78u-4(b)(3)(B), discovery was stayed pending ruling on the motions to dismiss.

On February 17, 2000, the District Court denied the Motion to Dismiss and Motion to Abate. (*See* AR Vol. 11, pp. 2670-72). On March 15, 2000, the District Court entered its Scheduling Order, which provided that (1) discovery must be completed by April 30, 2000 (45 days from entry of the

Scheduling Order), and (2) the final pretrial conference would be held on June 2, 2000 (79 days from entry of the Scheduling Order). (AR Vol. 12, p. 2802). The motion to reconsider the Scheduling Order was denied. (AR Vol. 13, p. 3042, p. 3105).

Rahr spared no expense in prosecuting his juggernaut attack against Petitioners, spending in excess of $8 million in attorneys' fees and expenses. (S.R.2,Vol. 8 at 676, 741-745). As a result, Petitioners were denied a fair opportunity to develop their defenses for trial.

Rule 26, FED. R. CIV. PROC. permits a district judge to dictate the terms and conditions upon which discovery may be had. *Transamerica Computer v. International Business Machines Corp.*, 573 F.2d 646, 652-53 (9th Cir. 1978). The power to set discovery deadlines in "exceptional" cases is not unlimited, "for the parties must be given a fair and adequate opportunity to develop their cases." *Id.*; *citing*, *Freehill v. Lewis*, 355 F.2d 46, 48 (4th Cir. 1965); *see also In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993).

In this case, the 45 days allowed by the District Court for discovery was an even shorter period of time than in *Freehill*. Further, the Petitioners were also at a disadvantage because of Respondents' superior financial resources and the discovery Respondents had obtained in other cases which was unavailable to Petitioners.

2. The time allocations and rulings denying trial participation at the pretrial conference were arbitrary and unreasonable

At the pretrial conference on June 2, 2000, the District Court allocated ten days for the jury trial, which based on an estimate of five-and-a-half hours per normal trial day, totaled approximately fifty-five hours for trial. (June 2, 2000 Reporter's Record "6/2 RR", p. 5:4-15). The District Court, "not having any better way to do this", allocated half of the time to the two Plaintiffs and the other half to "the defendants who

have participated in the preparation of the pretrial order." (6/2 RR p. 5:15-18). Under the circumstances, three groups of Defendants participated in the preparation of the pretrial order, of which the the RDSSR group was one. (6/2 RR p. 4:9-22). The District Court ruled that the remaining parties would not be permitted to present evidence or to question witnesses. (6/2 RR pp.4:23-5:2).

This time allocation by the trial court totally ignored the timely-filed exhibit list and witness list filed by Dale Sterritt, which indicated that he sought to introduce **251 trial exhibits** and to present **68 witnesses for total time of 206.5 hours!** The RDSSR group objected to the allocation of time, because of the complexity of the issues, and requested at least a sixty-five percent allocation of time to all Defendants, which was denied. (6/2 RR pp. 15:21-16:2; *See also* pp. 19:9-20:10). This arbitrary time allocation ignored the warning in the Advisory Committee Notes to the 1993 Amendments to Rule 16, FED. R. CIV. PROC. that although the rule authorizes a trial judge to limit the length of trial, "[a]ny such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination."

The District Court absolutely refused to hear any explanation from Dale Sterritt at the pretrial conference when he was banned from participating at trial, and summarily denied his motion for reconsideration which explained the reasons for not signing the pretrial order or inclusion of his suggested portions. (Rec. 3772, 3040). Therefore, from June 2, up until the very beginning of trial, Dale Sterritt was of the belief that he would be allowed no participation at trial.

The sanction visited upon Dale Sterritt was too severe under the circumstances. As the Fifth Circuit held in *United States v. Garrett*, 238 F.3d 293, 298, 300-301 (5th Cir. 2000) (Fish, Dist.

Judge, sitting by designation, concurring), in fashioning a sanction for discovery violations, a district court should impose only that sanction which is the least severe way to effect compliance with the court's discovery orders, finding that it was an abuse of discretion to exclude 25 Government witnesses where the violation could have been cured with a brief continuance. Here, Dale Sterritt had demonstrated a reasonable explanation for his non-signature to the pretrial order (*see*, Rec. 3772), and any violation could have been cured with a brief continuance.[3]

B. The last-minute reconsideration by the District Court at the beginning of trial materially changed the time allocation in an arbitrary and unfair manner

1. The District Court suddenly changed the rules at the very beginning of trial, and re-allocated the time for Defendants

On June 12, 2000, immediately before jury selection, in the first of several alterations of the rules for time allocation, the District Court reconsidered its decision to exclude the Defendants who had not participated in the preparation of the pretrial order, stating that they would be permitted to participate and receive their proportionate amount of time. (RR Vol. 1, p. 7:18-8:17). Based upon 14 Defendants "participating" in trial the District Court calculated that this would mean that each Defendant was entitled to 107 minutes **for argument and presentation of evidence**. (S.R.2, Vol. 4 at 8-9). (Emphasis added).

---

3. The decided cases supporting imposition of such drastic sanctions involved instances of non-compliance totally different than those present here. In each case, there were multiple failures to file pre-trial orders, and the district court had also levied lesser sanctions first, before dismissal. *Price v. McGlathery*, 792 F.2d 472, 473-74 (5th Cir. 1986); *Callip v. Harris Co. Child Welfare Dept.*, 757 F. 2d 1513, 1519 n.7, 1520-1521 (5th Cir. 1985).

The RDSSR Petitioners renewed their objection to the allocation of time based upon the inability to "have a fair opportunity to present their defenses", and the District Court responded "I understand your position." (RR Vol 1, p. 19:1-7).

2. *Per capita* allocation of time among Defendants in a conspiracy trial was manifestly prejudicial and unfair to Dale Sterritt, the central Defendant.

Dale Sterritt was first advised, literally at the beginning of trial, that he would be allowed to participate, (S.R. 2, Vol. 4, at 4-10), *but with absolutely no advance notice and no opportunity to prepare to present defenses!* This last-minute allocation of 107 minutes did not allow him a reasonable time to prepare and defend himself in a case in which the plaintiffs were seeking tens of millions of dollars in damages, giving him less than 30 seconds per numbered paragraph of the complaint, and less than 5 minutes per separate count, and only ***six seconds per exhibit*** for Respondents' 1039 trial exhibits.

The indefensibility of the time allocation is underscored by the following key factors:

1. There were 14 defendants, with 6 separate counsel representing several groups, and one pro se defendant.

2. The Plaintiffs' Exhibits numbered 1039. (Rec. 3439).

3. There were 18 witnesses who actually testified at trial, which would mean that Dale Sterritt would have had an average of less than 6 minutes per witness had he devoted his entire time only to witness examination.

4. Dale Sterritt had timely filed his exhibit list seeking to offer 251 trial exhibits. (Rec. 3579), and his witness list seeking to present 68 witnesses, for total estimated time of 206.5 hours. (Rec. 3590).

5. The Third Amended Complaint was 90 pages in length, with 265 numbered paragraphs, and 20 separate counts on which recovery was sought. (Rec. at Vol. 15).

6. The plaintiffs had an exceptionally-well-funded team of attorneys, with over $8 million in legal fees and expert and investigator fees, and state of the art graphics equipment, while virtually the entire assets of most of the defendants were frozen by pretrial orders of the trial court.

3. The reallocated time was absolutely inadequate for Petitioners to defend themselves.

During the trial, the District Court periodically announced the time used by the parties. *See, e.g.*, RR Vol. 2, p. 215:4-14 (the RDSSR group used a total of 93 minutes); RR Vol. 3, p. 442:5-19 (the RDSSR group used a total of 165 minutes); RR Vol. 4, pp. 199:2-200:12 (the RDSSR group used a total of 224 minutes); RR Vol. 5, p. 856:10-857:3 (the RDSSR group used a total of 304 minutes); RR Vol. 6, pp. 1110:25-1111:12 (the RDSSR group used a total of 332 minutes); RR Vol. 7, pp. 1321:20-1322:14 (the RDSSR group used a total of 432 minutes). On the eighth day of trial, the District Court again reminded counsel for the RDSSR group that the time allocated to the RDSSR group "includes any time you want to use for closing argument." RR Vol. 8, p 1432:8. Likewise, the District Court continually reminded counsel for Petitioner Dale Sterritt

of his usage of the limited allotment of time. (*See, e.g.*, S.R.2, Vol. 8, at 856)[4]

The Fifth Amendment to the United States Constitution guarantees that no person shall be deprived of property without due process of law. There can be no question that Petitioners were denied due process of law by the arbitrary time allocation decreed by the trial court, placing the court's own personal travel schedule ahead of the interests of justice and fair play, and ignoring timely-filed documents in order to hasten a pre-ordained rush to judgment.

This case bears striking similarity to the abuses of discretion presented in *Sims v. ANR Freight System, Inc.*, 77 F.3d 846 (5th Cir. 1996). In *Sims*, even though the trial court had imposed strict time limitations upon the parties, the Court affirmed, but warned that:

> **[I]f the goal of expediency is given higher priority than the pursuit of justice, then the bench and the bar both will have failed in their duty to uphold the Constitution and the underlying principles upon which our profession is founded.** Speed is necessary, and the limited capabilities of the judicial system certainly should be considered in determining whether to impose limits on the introduction of evidence and the length of trial.

---

4. At one point the District Judge stated:

> **I never make any effort to tell counsel how they should use their time, but I simply note without comment that we are approximately a little less than a third of the way through the trial, and Mr. Dale Sterritt has used almost half of his time. So he may be on short rations from here on unless he can get some of the other defendants to yield time to him.**

S.R.2, Vol.6, at 424 (Emphasis added).

> However, such considerations must be addressed with a cautious respect for the requirements necessary to achieve a fair trial.
>
> * * *
>
> **A trial is a proceeding designed to be a search for the truth.** *See Nix v. Whiteside*, 475 U.S. 157, 158, 106 S.Ct. 988, 989-990, 89 L.Ed.2d 123 (1986). The rules that have evolved over time that govern how trials are conducted in our society were conceived to aid the participants in performing their role in this search for the truth. Essential to the endeavor is an opportunity for the parties through their lawyers to present information in a manner that is comprehensible to a judge or jury. In this respect, the role played by lawyers in a trial is paramount. **When the manner of the presentation of information to a jury is judicially restricted to the extent that the information becomes incomprehensible then the essence of the trial itself has been destroyed.**

77 F.3d at 849 (Emphasis added). Here, sadly, the trial court's own travel schedule, and not a search for truth, seems to have caused the severe time limitations imposed upon Petitoners. (*See* S.R.2, Vol. 11, at 1476-1485).

A district judge has broad discretion in managing his docket, including trial procedure and the conduct of trial, and may maintain the pace of the trial by setting time limits on counsel. *Sims v. ANR Freight System, Inc.*, 77 F.3d 846 (5th Cir. 1996) (citing *Ruiz v. Estelle*, 679 F.2d 1115, 1129, *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct 1438, 75 L. Ed. 2d 795 (1983)). However, such discretion may be abused when the judge's conduct strays from neutrality and a defendant is denied a fair trial. *Ruiz*, 679 F.2d at 1129.

The key question is whether Petitioners' counsel was permitted to advocate effectively for their clients and whether "the court's restrictions hamper the jury's ability to understand the information and issues at trial." *United States v. Gray*, 105 F.3d 956 (5th Cir. 1997). When the restrictions placed on the lawyers regarding the manner of the presentation adversely impact on the comprehensibility of the evidence to the point that a party is denied a trial, the case should be reversed. *Sims*, 77 F.3d at 849.

C. The increase of 80 minutes of allotted time to Dale Sterritt after the Plaintiffs rested was insufficient to cure the prejudice suffered

Following numerous objections by Petitioners, the District Court finally changed, for the second time, the rules for time allocation.[5] **After the Plaintiffs/Respondents rested their case**, the District Court announced that he was going to allow an additional 80 minutes for Dale Sterritt. This change of rules, midstream, was too little, too late, because, as all seasoned trial practitioners realize, cross-examination at the time of initial presentation of damaging evidence, is critical to effective presentation of a defendant's case.

---

5. The trial judge had finally relented following numerous complaints by the defendants concerning the unfair allocation of time. *See* S.R.2, Vol.8 at 864-871. During this exchange, when one of the defense counsel expressed concern about Dale Sterritt, the primary defendant, nearly being out of time, the cavalier response of the trial court was:

> **And I warned him about it. I thought he spent a lot of time in cross examination which I thought was not needed.**

Id. at 867 (Emphasis added). The next trial day, ***after the plaintiffs had rested***, Dale Sterritt's counsel moved for more time, citing the prejudice to his client, S.R.2, Vol.9 at 945-949, and the court announced that the lunch break schedule would be altered to create an additional 80 minutes for him. *Id.* at 950.

D. Changing the previously-announced time allocation rules for closing argument was a further denial of due process

At the close of the evidence, the Petitioners expected to use their remaining time reserved by them for closing arguments, based upon numerous statements by the District Court that their time allocation was for both presentation of evidence and argument. Instead, the District Court announced that he would change the rules and allow the defendants only **10 minutes each**, and the Plaintiffs **70 minutes** to present closing argument. (RR Vol. 8, p. 1476:15-21, p. 1479:19-20, pp. 1479:21-1480:18). Petitioners objected. (RR Vol. 8, p. 1481:9-20). This re-allocation of time was apparently motivated by the District Court's desire to conclude the trial no later than Friday, June 23, 2000, because the District Judge was not going to be in town the following week. (*See* RR Vol. 8, p. 1483:13-14).[6]

The District Court's second revision of the time allotments arbitrarily limited the RDSSR group's time, and Dale Sterritt's

---

6. All the defendants vigorously objected to the fact that the primary defendant, Dale Sterritt, would be limited to only 10 minutes to present closing argument, but the trial judge expressed far more concern about his personal travel plans than the interests of justice or due process:

> **I'm not going to be in town next week. So we have, as I see it, two choices. One is to have a Saturday session so that we could possibly obtain a verdict that day. The other is next week that I may have to have a magistrate judge of this court receive the jury's verdict. . . . Friday afternoon is the absolute deadline. I have to have this case to the jury by Friday afternoon. . . . My guess is unless it appears, say, by five o'clock that the jury is close to a verdict, we would probably recess around five, and whatever we do, we would go to the next day or next week. . . . So my inclination is not to work Saturday *since I'm leaving town and I have other things to do.***

S.R.2, Vol. 11, at 1483-1485 (Emphasis added).

time, to ten minutes each for closing argument,[7] to the Petitioners' prejudice because they had reasonably relied on the earlier rulings of the District Court.

This change of the rules was a denial of a fair trial, considering the number of parties and the complexity of Plaintiffs' claims. The jury charge was 77 pages long, and contained 24 questions, none of which adequately could be addressed in 17 minutes of closing argument. To illustrate the imbalance, the Record contains 41 pages of argument from Plaintiffs' counsel (RR Vol. 9, pp. 1496-1530 and 1573-1580), 9 pages of argument from counsel for the RDSSR group (RR Vol. 9, pp. 1563-1572), and only five pages for Dale Sterritt (S.R.2, Vol. 12 at 1530-1535).

Over a century ago, the Texas Supreme Court held that

> On the trial of this cause, after the evidence had been closed, the court of its own motion limited the counsel for plaintiff and defendants to ten minutes in which to present their cause to the jury. This was such an error as will require a reversal of the judgment. Parties litigant have a right to be heard, by themselves or counsel, and no person shall be deprived of any rights or privileges excepting by due course of law. We think the court in this case attempted to abridge one of the fundamental rights of every citizen, and which we have no right to overlook.
>
> . . . . [P]arties have a right to a reasonable time for the presentation of the facts to the jury, as well as a reasonable time to comment on those facts, and to draw therefrom what they may consider the natural and legitimate deductions. What time would be

7. The RDSSR group had seventeen minutes for closing arguments because some of the other Defendants did not use their time. *See* RR Vol. 9, p. 1563:9-10.

> reasonable and proper must depend very much upon the nature of the case, and the facts to be presented, but we think it not subject to the arbitrary dictation of the court or judge.

Nesbitt v. Walters, 35 Tex. 576, 577 (1873). Notably, *Nesbitt* was a simple trespass to try title case, with few witnesses, and issues.

In *Dallas Railway & Terminal Co. v. Aultman*, 253 S.W.2d 900 (Tex. Civ. App. – Dallas 1952, *no writ*), for closing arguments, the trial court allocated 50 minutes to the plaintiff, 30 minutes to one defendant, and 20 minutes to the second defendant. The *Aultman* court stated that "we cannot say [the allocation of time] was harmless" and reversed the case for a new trial. *Id.*, 253 S.W.2d at 902 (citing *May v. Hahn*, 54 S.W. 416 (Tex. Civ. App. Dallas 1899, no writ); *Mitchell v. Robinson*, 162 S.W. 443 (Tex. Civ. App.– Galveston 1913); and *Cooper v. Robischung Bros.*, 155 S.W. 1050 (Tex. Civ. App.– Galveston 1913)).

In *Pirrung v. T. & N. O. Railroad Co.*, 350 S.W.2d 50, 51 (Tex. Civ. App. – Houston 1961, *no writ*), the court cautioned that "[t]he trial judge should be careful to allow counsel sufficient time to properly present his case and to discuss all issues submitted to the jury." Since the case involved a collision between a train and an automobile, and the court had allowed 30 minutes to the plaintiff, and 30 minutes each to two defendants, no abuse of discretion was found.

In *United States v. Gray*, 105 F.3d 956 (5th Cir. 1997), the Court of Appeals was confronted with an appeal from a mail fraud conviction where the trial court had limited each defendant to a three-minute opening statement, and a 13-minute closing statement, but had only allowed the prosecution five minutes for its opening and 15 minutes for closing argument. Noting that the only issue for the jury was whether or not the defendants had the requisite intent to defraud, and that the jurors were

presented with relatively clear testimony and simple documents, the Court of Appeals held that the time limitations did not constitute reversible error. *Id.* at 962-962.

Of course, here the record and the issues were much more complex, and there were voluminous stacks of exhibits dealing with complex transactions. Further, here, the plaintiffs had an equal amount of time to the **total** allotted to all of the defendants, whereas in *Gray*, the time for the government was approximately **equal to that of *each defendant*.**

Here, sadly, the trial court's own travel schedule, and the desire to control the time of the trial purely for arbitrary reasons, seems to have caused the severe time limitations imposed upon the defendants. Petitioners were confronted with 17 witnesses, 1041 pages of testimony presented by the plaintiffs' direct and cross examination, and 1039 trial exhibits, and given only 27 minutes in total for closing argument. This was a denial of due process, with complete disregard for the complexity of the case, and the severity of the damages sought against the Petitioners.[8]

One Texas court, confronted with a case in which there were 18 witnesses, and the testimony on several material issues was conflicting, held that limiting the plaintiff's counsel to 30 minutes for opening and closing, and stopping him at the expiration of 40 minutes was reversible error. *Cooper v. Robischung Bros.*, 155 S.W. 1050 (Tex. Civ. App. – Galveston 1913, *writ dism'd*).

---

8. The holding in *Rosiello v. Sellman*, 354 F.2d 219, 220 (5th Cir. 1965), that a limitation of 30 minutes per side for a negligence case, was not error, can likewise be distinguished due to the relative simplicity of the case presented there. That case involved only $7,000 in damages, and apparently very few witnesses and extremely simple facts.

E. The arbitrary and unfair time allocation caused fatal prejudice to Petitioners' ability to defend themselves

The harm resulting from this arbitrary time allocation by the District Court is best illustrated by examining several key factual disputes.

The conclusory testimony of one of Respondents' "experts" concerning the alleged "control" of "the Sterritts" over some 132 corporations was central to Respondents' claims of alleged failures to disclose "related-party" transactions. The testimony was based upon similarities in such things as mailing addresses and registered agents,[9] which could have been vigorously challenged in cross examination, but only through the expenditure of more than Petitioners' total time allotment.

Similarly, when Respondents presented conclusory "expert" testimony characterizing the alleged undisclosed related-party transactions, the testimony of the "experts" expended very few pages,[10] and very few minutes, of trial time, yet the underlying documents were voluminous, the transactions extremely complex, and any meaningful response would have taken days.

---

9. *See* testimony of Mary Little, at Second Supplemental Record, hereafter "S.R.2", pp.109-118, and PX-1004 for the amazing broad brush approach used to claim that "the Sterritts" "controlled" numerous entities, in which she expended a very few minutes to state that her staff had assembled a list of 132 corporations supposedly related in some vague fashion. For one of the defendants to have rebutted such conclusory testimony, to which a proper objection was raised (*see* p.109), it would have taken many hours. This is the necessary result of allowing an expert to testify in conclusory fashion, leaving it to the opposing party to challenge the conclusions in cross-examination. Since the defendants did not have ample time to cross-examine, this damaging testimony stood unrebutted.

10. *See*, S.R.2, Vol. 5, at 16-37 ("[T]hese transactions were . . . very complicated."); S.R.2, Vol.6, at 410-420.

These so-called "related party transactions," utilized to calculate the "damages" to Continental, were the following: (1) 30 acre transaction in Ellis County, Texas;[11] (2) 253 acre transaction in Ellis County, Texas;[12] (3) 20 acre transaction in Fulton County Georgia;[13] (4) 74 acre transaction in Fulton County, Georgia;[14] and (5) Fiber Seal acquisition.[15]

Further, allowance of more time would have permitted Petitioners to explain the total absence of any real damages to

---

11. The documents evidencing this transaction consisted of the following trial exhibits: PX-208, 220,220, 221, 222, 224, 225, 226, 227, 228, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 250, 471, 615, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 850, 852, 855, 931, 932.

12. The documents evidencing this transaction consisted of the following trial exhibits: PX-251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 692, 693, 694, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 852, 951, 952, 953.

13. The documents evidencing this transaction consisted of the following trial exhibits: PX-140, 141, 143, 144, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 166, 167, 170, 171, 172, 173, 174, 175, 176, 520, 523, 528, 531, 540, 615, 673, 692, 693, 694, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 859, 861, 862.

14. The documents evidencing this transaction consisted of the following trial exhibits: PX-103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 130, 142, 561, 565, 615, 723, 724, 725, 726, 727, 728, 729, 749, 750, 758, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 861, 862.

15. The documents evidencing this transaction consisted of the following trial exhibits: PX-280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 546, 547, 548, 561, 615, 801, 802, 802A, 803, 804, 805, 806, 806A, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 821A, 822, 858, 862, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012.

Continental. In all the so-called related party transactions, the principal consideration was Continental stock.[16] Continental could not, however, have been damaged thereby, because ***all of this stock was later cancelled and rendered worthless by the Continental bankruptcy court.*** (S.R. 2, Vol.9, at 1079-1082).

F. Petitioners preserved the time allocation complaint

Rule 103(a) of the Federal Rules of Evidence provides in part as follows:

> Once the court makes a definitive ruling on the record admitting or excluding evidence, **either at or before trial**, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(Emphasis Added).

Here, Dale Sterritt timely filed his witness list for trial and his exhibit list for trial, listing 68 witnesses for a total of 203.5 hours (Record at 3579), and listing 251 Exhibits (Record at 3590; S.R. at 15-16, 39-42). Dale Sterritt made objections before, during, and after trial to the time allocation imposed by the trial court. (*See* Rec. at 3579, 3590, 3772; 2nd S.R., Vol. 8, at 864-871; S. R.2, Vol. 9 at 945-949; S. R.2, Vol. 11 at 1477-1485; Rec. 1424). On numerous occasions throughout trial, Petitioners repeatedly objected to the time limitations. (*See, e.g.*, S.R.2, Vol. 8, at 864-871; Vol. 9 at 945-949; Vol. 11 at 1477-1485).

---

16. (1) the 30 acres was sold for 221,198 shares of Continental stock (PX-226); (2) the entity owning the 253 acres was transferred for 45,000 shares of Continental stock (PX-252), (3) the 20 acres was sold for 375,000 shares of Continental stock and $300,000 cash (S.R.2, Vol. 6, pp. 419-420), (4) the 74 acres was sold for 933,393 shares of Continental stock, $250,000 cash, and a $350,000 note convertible to Continental stock (S.R.2, Vol. 6, pp. 410-412), and (5) Fiber Seal was sold for 5,750,000 shares of Continental stock and an $800,000 convertible note (PX-284).

The purpose of an offer of proof is to make a clear record so that the appellate court can determine whether or not there has been error in excluding evidence. *Frisone v. U.S.*, 270 F.2d 401, 403 (9th Cir. 1959). The requirement of an offer of proof is excused where the court is aware from out of court discussions of the general nature of the evidence to be offered. *Charter v. Chleborad*, 551 F.2d 246, 249 (8th Cir. 1977), *cert denied*, 434 U.S. 856. Indeed, an offer of proof is unnecessary where an entire class of evidence has been formally declared inadmissible in advance by the trial court. *Greatreaks v. U.S.*, 211 F.2d 674, 676 (9th Cir. 1954).

Finally, Petitioners moved for a new trial based upon the unfair time allocations. (Rec. 1424,Vol. 20, p. 4249). The objection was preserved.

G. The usage of "timed trials" and their impact upon fundamental Due Process rights is a matter that justifies review by this Court pursuant to Rule 10(c), SUP. CT. R.

Petitioners respectfully submit that this issue is so fundamental to Due Process, that the time limitations imposed here, and the treatment of them by the Court of Appeals, involves an important question of federal law that has not been, and should be, settled by this Court. Rule 10(c), SUP. CT. R.

Although Petitioners do not have reliable statistics concerning the current overall prevalence of "timed trials," whereby trial time is kept by stopwatch, with counsel held strictly accountable for overall time usage, whether in the form of presentation of direct testimony, reading of deposition testimony, cross-examination of hostile, argumentative witnesses, discussion of numerous, voluminous exhibits, and presentation of opening, interim, and closing arguments, it is believed that the practice is already being used in a substantial number of courts. Further, the demands caused by the increasing backlog of cases in the Federal system, as well as the impetus of the

Civil Justice Reform Act, 28 U.S.C. §§ 471-482,[17] are likely to encourage more trial courts to utilize this dangerous approach.[18] According to *The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook*, published by the Federal Judicial Center, and written by David Rauma & Donna Stienstra (1995), there were already in 1995 seven Federal Districts reporting specifically various means for limitation of time at trial under "Methods for Trial Management," although most courts had not yet adopted any plan for trial management. *See generally Table 8*, pp. 212, 219, 222, and 224. Counsel are aware, for example, of two District Judges each in the Northern District of Texas, Fort Worth Division, and Dallas Division, who follow such practice in all civil trials, and have been advised at seminars and in discussions with other counsel that the practice is commonplace.

Petitioners must advise the Court that they cannot establish that there is any conflict among the Circuits on this point, simply because the few times that the matter has been addressed in opinions from the Courts of Appeals, the Courts have merely described it as something left to the "discretion" of the trial judge. Thus, the Courts of Appeals have abdicated responsibility by failing to provide any guidelines to the District Courts. As a result, this most critical and fundamental aspect of the very core of Due Process – a fundamentally fair trial – is being left to the unguided discretion of the District Courts, with effectively no meaningful review of their sometimes arbitrary actions.

---

17. This much was predicted by Judge Robert E. Keeton in his speech, "Times are Changing for Trials in Court," 21 Fla.St.U.L.Rev. 1, 18-19 (1993); *See generally*, Long Range Planning: A Reality in the Judicial Branch, 44 Am.U.L.Rev. 1599, 1613-1615 (1995).

18. It is not only the Petitioners herein who believe that iron-handed limitation of time within which to present one's case creates Due Process problems. *See*, The Hourglass and Due Process: The Propriety of Time Limits onCivil Trials, 26 U.S.F.L.Rev. 237, 250-259 (1992); Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion, 22 Hofstra L.Rev. 567, 597-599 (1994).

Accordingly, this issue is another type of issue "capable of repetition, yet avoiding review," *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911), because if the Courts of Appeal merely defer to the "discretion" of the trial courts, arbitrary and uneven treatment at the hands of hostile trial judges will be a wrong without a remedy.

Here, the arbitrary and unfair allocation of time was not done with any studied or careful analysis, but rather more as a punitive sanction. There was no attempt by the trial court, for example, to follow the detailed and helpful guidelines found in the *Civil Litigation Management Manual*, published by the Judicial Conference of the United States, Committee on Court Administration and Case Management (2001)[19], which lists numerous factors to consider (*see*, *e.g.*, pp. 84-87), and recommends:

> Setting time limits requires careful consideration of the views of counsel (who know the case), of the allocation of burdens among the parties, and of how the respective cases will be presented (e.g., one side may depend on cross-examination of the opponent's witnesses to present much of its case). Naturally, this should be done in full consultation with counsel.

Id. at p. 85. While this statement is not claimed to be authoritative, it is, nevertheless, good judicial common sense, which admonishes the trial judge to keep the rights of the litigants at the forefront, a consideration which was ignored in this case.

Petitioners respectfully request that the judgment below be reversed, due to their denials of Due Process arising from the unfair and arbitrary application of time limitations, and that, in so doing, this Honorable Court provide some guidance to the

---

19. The publication states that it is for the guidance of judges, and is not intended to be relied upon as authority, and creates no rights or duties.

Courts of Appeals and District Courts in providing time limits at trial, similar to the guidelines suggested in the *Civil Litigation Management Manual*, admonishing the lower courts, however, to keep the rights of the litigants at the forefront to avoid the type of treatment that occurred here.

II. RESPONDENTS COULD NOT LAWFULLY RECOVER DAMAGES FOR SECURITIES FRAUD BASED UPON ALLEGED MISREPRESENTATIONS WHICH CONTRADICTED CAUTIONARY STATEMENTS IN THE PUBLIC FILINGS OF CONTINENTAL

A. The key alleged misrepresentations relied upon were the subject of express cautionary statements in the publicly-filed disclosures of Continental

Rahr testified repeatedly that the two key representations upon which he relied were: (1) that the Ben Hill site, sometimes known as "the hole" would be permitted for use as a landfill, and (2) that Continental's stock would be listed on NASDAQ. (S.R.2, Vol. 8 at 692-694, 695, 699, 749-756; PX-69).

The risks and uncertainties regarding the ability of Continental to use the Ben Hill site for waste disposal were extensively discussed in the public filings of Continental, as summarized in the Statement of Facts above. These disclosures made it clear that the permitting process was highly uncertain, that environmental regulation made permitting more expensive, sometimes prohibitively so, and even included a qualification by the accountants expressing doubts that the company would even be a going concern.

Rahr's complaint makes it clear that in fact he was primarily relying upon alleged nonpublic representations made privately to him or to his son or advisers by Dale Sterritt. Rahr alleges certain matters, which constitute judicial admissions[20], admitting

20. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 195 (5th Cir. 1988).

his reliance upon nonpublic inside information in purchasing Continental stock (*see*, Complaint at 12-13, 14 ¶48, 16-18, 21-23, 31-33, 46-47, 48, for the alleged non-public misrepresentations, and Complaint at 15 ¶50, 17 ¶56, 23 ¶75, 24 ¶76, 33 ¶100, 47 ¶133, 48 ¶135, 74 ¶200, 75 ¶208, for the statements of reliance thereon). Therefore, based upon his own allegations, Rahr has admitted that the essence of his damages is based upon reliance upon inside information which he himself characterizes as material in purchasing Continental stock.

Since the key representations upon which Rahr allegedly relied were the subject of detailed public disclosures, with express cautionary disclaimers and warnings, it was apparent that Respondents sought to demonstrate entitlement to recover under the antifraud rules of the Securities Laws based upon **private, non-public misrepresentations allegedly made by Dale Sterritt which contradicted the public cautionary statements**.

As a general rule, courts in Texas will not lend their aid to enforcement of illegal contracts, but will leave the parties where the court found them. *Mercury Life & Health Co. v. Hughes*, 271 S.W.2d 842, 846 (Tex. Civ. App. – San Antonio 1954, *writ ref'd.*); *Lulirama Ltd. v. Axcess Broadcast Services*, 128 F.3d 872, 880 (5th Cir. 1997); *McFarland v. Haby*, 589 S.W.2d 521 (Tex.Civ.App.-Austin 1979, *writ ref'd., n.r.e.*); *Dominguez v. Trent*, 836 S.W.2d 677, 679 (Tex. App. – El Paso 1992, *no writ*); *Ben E. Keith Co. v. Lisle Todd Leasing, Inc.*, 734 S.W.2d 725, 727 (Tex. App.– Dallas 1987, *writ ref'd., n.r.e.*); *Plumlee v. Paddock*, 832 S.W.2d 757, 759 (Tex. App. – Fort Worth 1992, *writ denied*).

Under the 1934 Act, it is illegal for a person to purchase or sell a registered security for which public disclosures are required if the person is in possession of **"material, nonpublic information"**. 15 U.S.C. § 78u-1(a) (imposing liability in an action by the Securities and Exchange Commission), 15 U.S.C.

§ 78t-1(a) (creating a private right of action for contemporaneous purchasers or sellers against the person who sold or purchased while in possession of material, nonpublic information).

By his own pleadings, Rahr was acting as a "tippee" who had received material nonpublic information. A "tippee", who receives material nonpublic information from a company insider, assumes a fiduciary duty not to trade upon that information. *United States v. Ruggiero*, 56 F.3d 647, 655 (5th Cir. 1995), *cert. denied*, 516 U.S. 951, 979; *United States v. Bryan*, 58 F.3d 933, 953 (4th Cir. 1995); *SEC v. Stephenson*, 720 F. Supp. 370 (S.D.N.Y. 1989); *SEC v. Hurton*, 739 F. Supp. 704 (D. Mass. 1990).

It is well established that if the plaintiff is *in pari delicto*, his own illegal conduct will bar his recovery for securities fraud. *Pinter v. Dahl*, 486 U.S. 622, 632-641 (1988); *Bateman Eichler v. Berner*, 472 U.S. 299, 306-309 (1985). The record established conclusively that Rahr purchased Continental in reliance upon alleged untrue inside, nonpublic information.

B. Appropriate disclaimers of uncertainty, included in public filings, rendered reliance upon the key alleged representations unreasonable as a matter of law

The Fifth Circuit Court of Appeals has emphasized the difficulty of predicating securities fraud liability based upon predictions of future events. In *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 203ff. (5th Cir. 1988), the Court of Appeals concluded that this determination must be made on a case-by-case basis. *Id.* at 204-206; *accord*, *Rubinstein v. Collins*, 20 F.3d 160, 167-168 (5th Cir. 1994); *Mercury Air Group v. Mansour*, 237 F.3d 542, 547 (5th Cir. 2001). The *Isquith* court further noted that adequacy of disclosure can only be judged against an objective standard of investor behavior. *Id.* at 207-208; *accord*, *Mercury Air Group v. Mansour*, 237 F.3d 542, 547 (5th Cir. 2001).

In adopting the "safe harbor" rules for forward-looking statements, the Securities Exchange Commission allowed companies to make certain "forward-looking statements" in their public filings without incurring liability under the antifraud rules. Safe Harbor Rules for Projections, Securities Act Release No. 6084 [1979 Transfer Binder] Fed. Sec.L.Rep. (CCH) ¶ 82,117 (July 5, 1979) (adopting Exchange Act Rule 3b-6, 17 C.F.R. § 240.3b-6 (1987) and Securities Act Rule 175, 17 C.F.R. § 230.175 (1987), cited in *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 204 n.12 (5th Cir. 1988). The categories of such "forward-looking statements" which were thus insulated included statements of management's plans and objectives for future operations, and statements of future economic performance.

Although Rahr claims that Dale Sterritt misled him into believing that the two key alleged representations would occur, he further disclaims having spent much time reading or relying upon the public disclosures of these two predicted events, or the cautionary disclaimers made concerning them, in the Continental public filings. These statements by Rahr indicate a complete lack of the due diligence required of investors who assert a claim under Rule 10b-5 under Fifth Circuit law. *Mercury Air Group v. Mansour*, 237 F.3d 542, 547 (5th Cir. 2001).

As the *Isquith* court made clear, the adequacy of disclosures concerning future events is to be measured against an **objective** standard of investor behavior, looking at the information disclosed in the public filings concerning such matters as a whole. 847 F.2d at 207-208. More recently, the Fifth Circuit, in *Rubinstein v. Collins*, 20 F.3d 160 (5th Cir. 1994), explained that the "bespeaks caution" doctrine " has developed to address situations in which optimistic projections are coupled with cautionary language" and held that the applicable test is whether a reasonable investor would consider the prediction significant in light of the entire mix of information. 20 F.3d at 167-168; *citing, Krim v. BancTexas Group*, 989 F.2d 1435, 1445 (5th Cir.

1993); *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 207-208 (5th Cir. 1988).

Here, given the public disclosures made by Continental regarding the risks, uncertainties, and expenses inherent, it is clear that reliance by an objective reasonable investor would have been unreasonable. *Mercury Air Group v. Mansour*, 237 F.3d 542, 547 (5th Cir. 2001).

C. Denial of recovery for security fraud to persons who have relied upon nonpublic misrepresentations contradicting public disclosures is of critical importance to the securities markets

Petitioners respectfully submit that this issue involves an important question of federal law that has not been directly settled, and should be, settled by this Court. Rule 10(c), SUP.CT.R. Although this Court has recognized the applicability of the *in pari delicto* defense, *Pinter v. Dahl*, 486 U.S. 622, 632-641 (1988), *Bateman Eichler v. Berner*, 472 U.S. 299, 306-309 (1985), the principle urged herein is a direct and necessary corollary to the doctrine, one essential to maintaining the integrity of the securities markets. If a party relying upon material inside information directly contradictory to cautionary public disclosures is allowed to recover the largest judgment in the history of the Northern District of Texas as his compensation for such illegal conduct, the courts will make a mockery of the antifraud provisions of the securities laws.

CONCLUSION

For the reasons stated above, Petitioners respectfully pray that this Honorable Court issue its Writ of Certiorari to the Court of Appeals for the Fifth Circuit, and, upon review, reverse the judgment of the District Court, render judgment that Respondents take nothing for their claims under the Federal Securities laws, and remand this case, with costs taxed against Respondents.

Respectfully submitted,

EMIL LIPPE, JR.
Counsel of Record
LAW OFFICES OF LIPPE & ASSOCIATES
2001 Bryan Street, Suite 1850
Dallas, TX 75201
(214) 855-1850

CHRISTOPHER M. WEIL
WEIL & PETROCCHI, P.C.
1900 Thanksgiving Tower
1601 Elm Street
Dallas, TX 75201
(214) 969

JEFFREY W. HELLBERG, JR.
ARTER& HADDEN, LLP
1717 Main Street, Suite 4100
Dallas, TX 75201
(214) 761-2100

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JUNE 7, 2002

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-10947

STEWART RAHR, in his own right and in the right and on behalf of Continental Investment,

Plaintiff-Appellee,

VERSUS

RESCUE CAPITAL CORPORATION, ET AL.,

Defendants,

MALCOLM M. KELSO, R. DALE STERRITT, JR., EDWARD W. ROUSH, JR., FRED ROYER, RICHARD D. STERRITT, SR., LARRY STERRITT, STERRITT PROPERTIES, INC., and 20TH CENTURY HOLDINGS, INC.,

Defendants-Appellants,

VERSUS

CONTINENTAL INVESTMENT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas

(3:99-CV-628-G)

Appendix A

Before DUHÉ, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIUM:*

I. PROCEDURAL HISTORY

This case involves a convoluted mix of facts and parties. There is one plaintiff, Stewart Rahr (suing on his own behalf and on behalf of Continental Investment Corporation), and five groups of appealing defendants: (1) Dale Sterritt; (2) the "Sterritt Group" (consisting of Dick Sterritt, Larry Sterritt, Sterritt Properties, Inc. and 20th Century Holdings, Inc.); (3) Edward W. Roush; (4) Fred Royer; and (5) Malcolm Kelso.[1]

Rahr initially sued the defendants on October 9, 1998, in the Eastern District of New York. He alleged that various defendants were engaged in a massive fraudulent enterprise related to Continental Investment Corporation (CIC). He sought to recoup the approximately $12 million that he invested in CIC and lost as a result of the defendants' fraudulent activities.

The suit was then moved by the defendants to a bankruptcy court in Texas. On May 18, 1999, it was transferred to the Northern District of Texas. CIC then intervened to assert claims against the defendants. When the case was finally tried in the Northern District of Texas, the jury returned a unanimous verdict

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1. On March 19, 2001, this Court dismissed Kelso's appeal pursuant to the fugitive disentitlement doctrine. On September 17, 2000, we reconsidered that decision and reinstated his appeal.

for the plaintiffs against some of the defendants, and the District Court accordingly entered judgment in their favor. Some of those defendants now appeal here. Finding no error, we AFFIRM the District Court's judgment.

II. THE FACTS

CIC is a waste disposal company, which has been liquidated in bankruptcy since the onset of this litigation. Dale Sterritt was CIC's President and CEO. Before 1998, Sterritt Properties, Inc. was CIC's largest shareholder.

Rahr met Dale Sterritt in 1995. Based on Dale's representations about CIC, Rahr began investing in the company and continued to purchase stock in CIC through 1998. In total, he invested about $11.6 million, becoming CIC's largest investor. He also made loans totaling $450,000 to Dale and a Sterritt-family-owned company. Ultimately, his entire investment was lost, and the loans were never repaid.

At trial, the specifics of the various business ventures and dealings at issue were discussed in great detail. In brief, according to the plaintiffs' allegations, the defendants induced investors to buy millions of dollars of CIC stock by "representing that CIC's immense quarry excavation in Atlanta was ideally suited for use as a municipal landfill, and by promising that CIC was about to be listed on the NASDAQ." Then, "[o]nce the investment dollars started pouring in, the Sterritts, Roush, and Royer used [several] related corporations to siphon the money into their own pockets, and used various illegal stock sales to raise even more cash for themselves." According to Rahr, the defendants accomplished their fraudulent scheme in part by using companies that, while held out as unrelated to the Sterritts, were secretly owned and controlled by them.

Appendix A

III. ISSUES RAISED

Five groups of defendants filed briefs here. Each defendant raised several issues, and some issues were raised by more than one defendant. In summary, the defendants challenge: (1) whether the District Court abused its discretion by imposing sanctions against the defendants who did not participate in the pre-trial order; (2) whether the District Court abused its discretion by placing time limitations on the parties during trial; (3) whether the defendants are entitled to a new trial because the jury foreperson allegedly engaged in misconduct; (4) whether the plaintiff, Stewart Rahr, had standing to bring claims on CIC's behalf; (5) whether the District Court lacked jurisdiction to submit certain questions to the jury; and (6) whether the District Court erred by issuing an All Writs Act injunction requiring permission from the court for any party to file bankruptcy or any related lawsuits in other jurisdictions. In addition, the defendants raised numerous challenges related to the legal and factual sufficiency of the evidence.

IV. CONCLUSION

After reviewing the voluminous record in this case and carefully considering the parties' respective briefings, we find no error on the part of the District Court with respect to those issues not waived on appeal. Accordingly, we AFFIRM the District Court's judgment.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED JULY 10, 2000 AND ENTERED JULY 11, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:99-CV-0628-G

STEWART RAHR and
CONTINENTAL INVESTMENT CORPORATION,

Plaintiffs,

v.

R. DALE STERRITT, JR., *et. al.*,

Defendants.

FINAL JUDGMENT

On June 12, 2000, the Court called this case to trial. Plaintiffs Stewart Rahr ("Rahr") and Continental Investment Corporation ("CIC") and Defendants R. Dale Sterritt, Jr. ("Dale Sterritt"), Richard D. Sterritt, Sr. ("Dick Sterritt"), Edward W. Roush, Jr. ("Roush"), Freddie Joe Royer, Jr. ("Royer"), Malcolm M. Kelso ("Kelso"), Larry Wayne Sterritt ("Larry Sterritt"), Richard Straza ("Richard Straza"), Robyn Ann Straza-Sterritt ("Robyn Straza-Sterritt"), Sterritt Properties, Inc. ("Sterritt Properties"), and 20th Century

Holdings, Inc. ("20th Century") appeared in person, by corporate representative, and/or through their attorneys of record and announced ready for trial. The Court determined that it had jurisdiction over the subject matter and the parties to this proceeding. The Court then impaneled and swore the jury, which heard the evidence and arguments of counsel. The Court submitted questions, definitions, and instructions. In response, the jury made findings that the Court received, filed, and entered of record.

As part of its verdict, the jury found that the following defendants engaged in conduct constituting fraud: Dale Sterritt, Dick Sterritt, Roush, Royer, Larry Sterritt, Sterritt Properties, and 20th Century. In addition to these defendants, the jury also found that the following defendants engaged in conduct constituting conspiracy to commit fraud: Malcom Kelso, Richard Straza, and Robyn Straza-Sterritt.

The jury also found that the harm experienced by CIC from the failure to comply with a fiduciary duty and/or conspiracy was the result of malice or fraud on the part of the following defendants: Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, and Sterritt Properties.

In addition, the jury found that the following defendants committed theft: Dale Sterritt, Dick Sterritt, Roush, Royer, and Kelso.

Finally, the jury found that certain defendants were responsible for the conduct of the following corporations: (1) for Kelso & Roush, Inc.: Kelso and Roush; (2) for Nikko Trading of America Corporation: Dale Sterritt, Dick Sterritt,

Roush, Royer, and Kelso; (3) for Woodland Ventures, Inc.: Dale Sterritt, Dick Sterritt, Roush, and Kelso; (4) for Swan Financial Services, Inc.: Dale Sterritt and Dick Sterritt; (5) for Atremo Holdings, Inc., S.A.: Dale Sterritt, Dick Sterritt, Roush, and Royer; and (6) for Wallenberg Financial, Inc., S.A.: Dale Sterritt, Dick Sterritt, Roush, and Royer.

The Court now renders judgment for Plaintiffs based on the jury's verdict and incorporates the jury's findings for the purposes of this judgment.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that, based on the jury's verdict and/or the default judgments previously entered against Kelso & Roush, Inc., Nikko Trading of America Corporation, Woodland Ventures, Inc., Swan Financial Services, Inc., Atremo Holdings, Inc., S.A., and Wallenberg Financial, Inc., S.A., Plaintiff Rahr's Motion for Judgment as a Matter of Law, and the evidence presented at trial, Rahr is entitled to and shall recover judgment against Defendants Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover actual damages of $12,185,712 from Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century, jointly and severally.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $50,000,000 from Dale Sterritt.

Appendix B

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $10,000,000 from Dick Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $5,000,000 from Roush.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $5,000,000 from Royer.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $5,000,0000 from Kelso.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $5,000,000 from Larry Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover exemplary damages of $8,000,000 from Sterritt Properties.

IN ADDITION, IT IS ORDERED, ADJUDGED, AND DECREED that, based on the jury's verdict and/or the default judgments previously entered against Kelso & Roush, Inc., Nikko Trading of America Corporation, Woodland Ventures, Inc., Swan Financial Services, Inc., Atremo Holdings, Inc., S.A., and Wallenberg Financial, Inc., S.A., and the evidence presented at trial, CIC is entitled to and shall recover judgment against Defendants Dale Sterritt, Dick

Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover actual damages of $15,646,000 from Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century, jointly and severally.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover profits wrongfully obtained in the amount of $8,000,000 and exemplary damages of $50,000,000 from Dale Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover profits wrongfully obtained in the amount of $3,000,000 and exemplary damages of $10,000,000 from Dick Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover profits wrongfully obtained in the amount of $1,000,000 and exemplary damages of $5,000,000 from Larry Sterritt.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover profits wrongfully obtained in the amount of $12,000,000 and exemplary damages of $8,000,000 from Sterritt Properties.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover exemplary damages of $5,000,000 from Roush.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover exemplary damages of $5,000,000 from Royer.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover exemplary damages of $5,000,000 from Kelso.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr shall recover prejudgment interest in the amount of $2,747,627.66, and post-judgment interest as provided by law, from defendants Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century, jointly and severally.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that CIC shall recover prejudgment interest in the amount of $3,004,889.32, and post-judgment interest as provided by law, from defendants Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century, jointly and severally.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that costs of court shall be taxed against defendants Dale Sterritt, Dick Sterritt, Roush, Royer, Kelso, Larry Sterritt, Richard Straza, Robyn Straza-Sterritt, Sterritt Properties, and 20th Century.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that Rahr and CIC shall recover post-judgment

interest, at the maximum rate provided by law, on each amount of exemplary damages awarded, and costs taxed, against each defendant. In addition, the verdict of the jury as to defendants Suresh Chainani, Kanayo Wadhwani and Dresco Investments, Inc. (the "Dresco Defendants"), and Sarah Sterritt, was for the Dresco Defendants and Sarah Sterritt and against Plaintiffs. Accordingly, the Court hereby determines that judgment should be rendered on the verdict in favor of the Dresco Defendants and Sarah Sterritt and against Plaintiffs.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiffs Rahr and CIC shall take nothing by their suit against Suresh Chainani, Kanayo Wadhwani, Dresco Investments, Inc., and Sarah Sterritt.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that all costs of court incurred by Suresh Chainani, Kanayo Wadhwani, Dresco Investments, Inc., [and Sarah Sterritt] are hereby taxed against Rahr and CIC.

IT IS, FINALLY, ORDERED, ADJUDGED, AND DECREED that all further affirmative relief requested by Rahr and/or CIC against the aforementioned defendants is DENIED.

The Court ORDERS execution for this judgment.

THIS IS A FINAL JUDGMENT.

SIGNED this 10 day of July, 2000.

s/ A. Joe Fish
THE HONORABLE A. JOE FISH
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AND FILED JULY 8, 2002

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 00-10947

STEWART RAHR, in his own right and in the right and on behalf of Continental Investment,

Plaintiff-Appellee,

VERSUS

RESCUE CAPITAL CORPORATION, ET AL.,

Defendants,

MALCOLM M. KELSO, R. DALE STERRITT, JR., EDWARD W. ROUSH, JR., FRED ROYER, RICHARD D. STERRITT, SR., LARRY STERRITT, STERRITT PROPERTIES, INC., and 20TH CENTURY HOLDINGS, INC.,

Defendants-Appellants,

VERSUS

CONTINENTAL INVESTMENT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITIONS FOR REHEARING

Appendix C

Before DUHÉ, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIUM:

IT IS ORDERED that the petitions for rehearing are DENIED. We caution counsel for Kelso and Roush about the inappropriateness of making unfounded assertions about the basis for our original decision in this case.

ENTERED BY THE COURT:

s/ [illegible]
United States Circuit Judge

Supreme Court, U.S.
FILED
NOV 5 2002
CLERK

No. 02-550

In The
Supreme Court of the United States

R. DALE STERRITT, JR., RICHARD D. STERRITT, SR., LARRY STERRITT, STERRITT PROPERTIES, INC., and 20TH CENTURY HOLDINGS, INC.,

Petitioners,

v.

CONTINENTAL INVESTMENT CORPORATION and STEWART RAHR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LAWRENCE J. FOSSI
Counsel of Record
STEPHANIE K. CRAIN
FOSSI & CRAIN
1113 Autrey Street
Houston, Texas 77006
(713) 529-4000

WILLIAM D. SIMS, JR.
ROBBI BROWNHILL HULL
MICHAEL L. RAIFF
VINSON & ELKINS, L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-7700

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does this case implicate any genuine due process concerns where the record, fairly construed, presents only the following questions:

   a. Does a District Court have the discretion to order parties to participate in drafting and filing a joint pretrial order that outlines the claims and defenses at issue, and to enforce such an order by barring the non-participants from presenting evidence or questioning witnesses?

   b. Where a District Court initially prohibits parties who failed to participate in the joint pretrial order from presenting evidence or questioning witnesses, does the District Court have the discretion, before trial commences, to reverse its order and to allow those parties to participate fully in trial?

   c. Do the defendants waive any complaint about a District Court's time allocations, where the defendants (i) rested their cases without using all their allocated time, and (ii) failed to identify any witnesses they would have called had they been granted even more time?

   d. Does a District Court have the discretion to set time limits on the presentation of evidence in a jury trial, and, if so, is allocating the time equally among plaintiffs and defendants, and among defendants on a per capita basis, within the Court's discretion?

2. Does this case present any novel or important question of federal securities law, where, as here:

   a. The Final Judgment is based and can be affirmed on the jury's findings that all the defendants violated Texas state law?

   b. Petitioners failed properly to present their alleged defense under federal securities law to the District Court?

   c. This Court already has held that a defense under the doctrine of *in pari delicto* is not available to persons like Petitioners, *i.e.*, the persons who supplied the so-called inside information?

   d. The record, fairly construed, contains evidence of numerous misrepresentations, many of which were not, even arguably, subject to any cautionary statement?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioners, five additional parties warrant mention. Malcolm M. Kelso, Edward W. Roush, Jr., and Freddie Joe Royer, Jr. were defendants-appellants in the proceedings below, but did not file a petition for certiorari here. Richard Straza and Robyn Ann Straza-Sterritt were defendants in the District Court, but did not pursue an appeal to the Court of Appeals for the Fifth Circuit, and did not file a petition for certiorari here.

Continental Investment Corporation has no parent corporation. No publicly traded corporation owns more than 10 percent of Continental Investment Corporation's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6 iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

I. The Sterritts Used Fraudulent Transactions To Inflate CIC's Balance Sheet 1

II. The Sterritts Lied That CIC's Immense Quarry Excavation Could Be Used As a Landfill 3

III. The Sterritts Also Lied That CIC's Stock Would Be Listed on the NASDAQ Exchange .. 4

IV. Through Yet More Fraudulent Transactions, the Sterritts Siphoned Millions of Dollars Out of CIC 5

V. In 1998, Rahr Discovered the Sterritts' Fraud, and Filed Suit 5

VI. The Jury Found That the Sterritts Committed Numerous Violations of State and Federal Law 6

REASONS FOR DENYING THE WRIT 7

I. This Case Does Not Present Any Genuine Due Process Concerns 7

A. The Time Allocations Were Based upon a Trial Length to Which Petitioners Agreed 8

TABLE OF CONTENTS – Continued

Page

B. Petitioners Did Not Use All the Time Allocated for the Presentation of Evidence 9

C. Petitioners Did Not Exhaust the Time Allowed for Closing Argument 11

D. Petitioners Obtained All the Discovery That They Sought 12

E. Sanctions That Were Never Imposed Did Not Violate Dale Sterritt's Rights 13

II. This Case Does Not Present Any Novel or Important Question of Federal Securities Law 14

A. The Final Judgment Can Be Affirmed Without Relying on Federal Securities Law 14

B. Petitioners Cannot Rely upon the Doctrine of *In Pari Delicto* 15

C. The Record Does Not Even Support Petitioners' Alleged Defense 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Abbott v. Equity Group, Inc.,
2 F.3d 613 (5th Cir. 1994) 14

Bateman Eichler, Hill Richards, Inc. v. Berner,
472 U.S. 299 (1985) 16

Johnson v. Ashby,
808 F.2d 676 (8th Cir. 1987) 9

Martel v. County of Los Angeles,
56 F.3d 993 (9th Cir. 1995) 13

McKnight v. General Motors Corp.,
908 F.2d 104 (7th Cir. 1990) 9

Monotype Corp. v. International Typeface Corp.,
43 F.3d 443 (9th Cir. 1994) 9

Pinter v. Dahl,
486 U.S. 622 (1988) 16

Sablan v. Department of Fin.,
856 F.2d 1317 (9th Cir. 1988) 13

United States v. Bernes,
602 F.2d 716 (5th Cir. 1979) 11, 12

United States v. Leal,
30 F.3d 577 (5th Cir. 1994) 11

RULES

FED. R. EVID. 103(a)(2) 9

SUP. CT. R. 15(2) 7

STATEMENT OF THE CASE

Petitioners Richard D. Sterritt, Sr. (*"Dick Sterritt"*) and R. Dale Sterritt, Jr. (*"Dale Sterritt"*) obtained control of Continental Investment Corporation (*"CIC"*) in 1991. PX802. During the next seven years, they converted CIC into a massive fraudulent enterprise, the principal purpose of which was to raise investment dollars to be siphoned into the pockets of the Sterritts and their confederates.

Stewart Rahr (*"Rahr"*) was CIC's largest investor. From the fall of 1995 through the spring of 1998, he bought $11.6 million of CIC stock for himself, his wife, and his children. 2SR8:688; PX81-88. That entire investment (as well as the investments of many others) was lost as a consequence of the Sterritts' frauds.

I. The Sterritts Used Fraudulent Transactions To Inflate CIC's Balance Sheet.

To attract investors, the Sterritts created the appearance that CIC possessed valuable assets. To accomplish this, the Sterritts used related corporations to transfer assets to CIC at inflated prices. In violation of SEC regulations, the Sterritts disguised the fact that the transactions were among related parties. 2SR6:400-10. Then, in violation of generally accepted accounting principles, the Sterritts caused CIC to place the assets on its balance sheet at the inflated values. *Id.*

An example of one such transaction (taken from the numerous transactions established by the evidence) involved Petitioner 20th Century Holdings, Inc. (*"20th Century"*) and Swan Financial Services, Inc. (*"Swan Financial"*). Dick Sterritt had prevailed upon a family

friend, Wilma Graham, to act as the owner of Swan Financial, agreeing that her ownership would be illusory. PXA:36-38, 60, 183-86; PX723:5. Graham had almost no understanding of Swan Financial's business affairs; her job was simply to sign blank checks, deeds, and other documents. PXA:49, 68-69, 72-73, 79-81, 83-84, 103-04, 113-15, 118-19. Dick Sterritt maintained the company's bank accounts and business records, and he and Dale Sterritt controlled its business affairs. 2SR6:237, 346-47; PXA:68-69, 96-97, 372, 607-08.

In late 1994, 20th Century acquired a 74-acre parcel of land in Atlanta for $440,000. 2SR6:410-16; PX103. By a deed dated five months later, 20th Century sold the land to Swan Financial for $600,000. 2SR6:410-16; PX109. Only eight days after the deed from 20th Century was recorded, Swan Financial sold the land to CIC for $3.4 million. 2SR6:410-16; PX111. Thus, as reflected on CIC's balance sheet, the land's value was inflated by almost $3 million. 2SR6:414-16; PX816.

All told, the Sterritts used related-party transactions to inflate CIC's balance sheet by almost $10 million.[1] 2SR7:16-17.

---

[1] The Sterritts obtained most of their CIC stock in a fraudulent transaction involving Petitioner Sterritt Properties, Inc. 2SR7:18-29; PX281. As a consequence, Petitioners' claim that most of the Sterritt family assets were "invested" in CIC stock is misleading. *See* Petition at 4. The Sterritts received their CIC stock for no real consideration.

II. The Sterritts Lied That CIC's Immense Quarry Excavation Could Be Used As a Landfill.

CIC's principal asset was a 133-acre site in Atlanta, featuring an enormous quarry excavation known as the "*Hole*." 2SR5:13-14; PX16:7. In late 1993, Dale Sterritt commissioned an engineering firm to study whether the Hole could be used as a landfill. PXB:7-8, 12-13; PX11-12.

The study focused only on the least problematic (and least profitable) category of landfill, a landfill for inert waste.[2] PXB:12-13; PX13:CIC0202853, 69.[3] The engineering firm's written report indicated that, because of the irregular shape and extraordinary depth of the excavation, and because of fractures in the quarry wall, groundwater and storm water were likely to present significant problems even for an inert waste landfill. PX13:CIC02027867, 83; *see also* PXB:24-25, 36-38. Needless to say, these same problems made use of the Hole as a municipal solid waste landfill even more highly doubtful.[4]

After the engineering firm submitted its report, Dale Sterritt asked that the report be modified (without any further work) to include discussion of developing the Hole as a municipal solid waste landfill. PXB:34-36, 57. The

---

[2] Inert waste includes materials, such as concrete and yard trimmings, that present no environmental concerns. PXB:13-14, 27-28.

[3] Because of an error in the original pagination of PX13, Respondents cite to particular pages using the Bates numbers of that exhibit.

[4] Municipal solid waste includes household garbage. PXB:16-17, 28. Landfills for municipal solid waste have the greatest revenues but also the greatest environmental concerns. They are subject to significant (and potentially costly) regulatory requirements. PXB:18-19.

firm's principal believed any modifications would be misleading and declined to change the report. PXB:36, 58.

Nonetheless, CIC's SEC filings, beginning in 1994, stated that the company had commissioned an independent study to explore converting the quarry "into a municipal solid waste landfill and waste transfer station." PX16:7. CIC's filings further stated that "the study concluded that the site would support landfill operations." *Id.* In 1995, the Sterritts added another embellishment: "A preliminary study of the [p]roperty indicated its viability as a potential multi-use waste disposal, waste transfer, and recycling facility." PX17:3. Dale Sterritt orally repeated those claims on numerous occasions to Rahr. 2SR8:689-92, 725-30. Of course, all those claims were false. PXB:43-46, 52-56.

III. The Sterritts Also Lied That CIC's Stock Would Be Listed on the NASDAQ Exchange.

The Sterritts did not confine their representations to lies about CIC's assets. The Sterritts also made misrepresentations about the marketability of CIC stock. Dale Sterritt repeatedly told investors, including Rahr, that because of its growing asset value, CIC was on the brink of being listed on the NASDAQ exchange. 2SR8:692, 727-28; PX46. Sterritt never revealed that on September 25, 1996, NASDAQ advised that it would *not* approve CIC's application for a listing. PX4. Instead, Sterritt continued to promise that he was making rapid progress at obtaining the listing. 2SR8:693-96.

IV. Through Yet More Fraudulent Transactions, the Sterritts Siphoned Millions of Dollars Out of CIC.

The end goal of the Sterritts' frauds was to siphon money out of CIC. Sometimes, the money came out as cash payments to undisclosed related parties, such as the cash components of the related-party transactions referenced above. More often, the cash came out by means of the Sterritts' stock fraud and "loans" to various (undisclosed) Sterritt affiliates. 2SR5:152-55, 177-98; 2SR6:250-52, 419-20; 2SR7:6; 2SR10:1145, 1287-89, 1292; 2SR11:1376-79; PX185-86, 203-07, 308-09, 511:168-71, 802, 802A. Using these methods, the Sterritts were able to divert several million dollars in cash and assets out of CIC, and were able to raise millions more by manipulating the price of and laundering CIC stock. *Id.*

V. In 1998, Rahr Discovered the Sterritts' Fraud, and Filed Suit.

In the summer of 1998, concerned that no progress had been made in permitting the Hole or obtaining a NASDAQ listing, Rahr began investigating Dale Sterritt's business activities. 2SR8:700-04, 710-13. By September 1998, Rahr had gathered significant evidence of fraud, 2SR8:713-14, 720-23, and filed suit in the United States District Court for the Eastern District of New York.

In January 1999, a corporation controlled by Dale Sterritt purported to "remove" Rahr's New York lawsuit to federal bankruptcy court in Texas. R8:1742-52; PX425. Eventually, on April 26, 1999, the reference was withdrawn, and the case came to rest, on May 18, 1999, before the Honorable A. Joe Fish, United States District Court for

the Northern District of Texas. R1:42, 69. In the meantime, the Sterritts had been removed from control of CIC, and CIC intervened to assert its claims against the Sterritts and their confederates.

By the time this case came to Judge Fish, he already was presiding over two related cases. And, he already had experience with the litigation tactics of Petitioners and their lieutenants. In attempting to block Judge Fish from ruling on injunction motions in related cases, the Sterritts and their co-defendants already had demonstrated their propensity to instigate bad-faith bankruptcy filings and collusive state court lawsuits designed to undermine the orders and jurisdiction of the District Court. *See* PX360-61. They continued those practices in this case, and on May 2, 2000, the District Court entered an order (a) requiring the defendants to file any related lawsuit in the Northern District of Texas, and (b) placing restrictions on any bankruptcy filings, unless the Court's consent was first obtained. ARE2.

VI. The Jury Found That the Sterritts Committed Numerous Violations of State and Federal Law.

On June 11, 2000, despite the defendants' efforts to derail it, this case came to trial. After hearing eight days of testimony, the jury deliberated for only a few hours and returned a unanimous verdict against the defendants. RE5. Among other things, the jury found that Petitioners had committed federal securities fraud, committed Texas statutory fraud, and entered into a civil conspiracy to commit statutory fraud against Rahr. *Id.* The jury also found that Petitioners breached their state-law fiduciary

duties and/or conspired to breach their state-law fiduciary duties to CIC. *Id.*

Based on that verdict, the District Court entered a Final Judgment in favor of Rahr and CIC. RE7. The Court of Appeals for the Fifth Circuit affirmed, in a per curiam opinion, finding no error "with respect to those issues not waived on appeal." *See* Petitioners' App. 1a-4a.

REASONS FOR DENYING THE WRIT

Respondents file this brief in opposition to point out numerous misstatements and material omissions in the Petition for Writ of Certiorari. *See* SUP. CT. R. 15(2).

I. This Case Does Not Present Any Genuine Due Process Concerns.

In their first attempt to grab this Court's attention, Petitioners pretend they are the victims of a capricious district court judge who was more concerned about protecting his own vacation schedule than he was about giving the defendants an opportunity to present their side of the case. *See* Petition at 12 (criticizing the District Court for placing its "own personal travel schedule ahead of the interests of justice and fair play"), 13 ("Here, sadly, the trial court's own travel schedule . . . seems to have caused the severe time limitations imposed upon Petitioners."), 15 n.6 (complaining that the District Court "express[ed] far more concern about his personal travel plans than the interests of justice and fair play"), 18 ("Here, sadly, the trial court's own travel schedule . . . seems to have caused the severe time limitations imposed upon the defendants."). Petitioners claim that the District Court's

time limits were so arbitrary that they violated the defendants' rights to due process of law. *See* Petition at 8, 10-14, 19-21.

In fact, however, the District Court's time limits appear arbitrary only if one ignores, as Petitioners do, the valid reasons for those limits. When the record is fairly examined, one can readily see that the District Court's actions were far from arbitrary. Rather, the District Court's actions were fair and reasoned responses to the circumstances before the Court. Certainly, the District Court's actions do not raise any genuine concerns about Petitioners' rights to due process of law.

A. The Time Allocations Were Based upon a Trial Length to Which Petitioners Agreed.

In portraying the District Court as arbitrary, Petitioners fail to mention that the District Court's time limits were based upon an estimated trial length to which Petitioners assented. In its Order Establishing Schedule and Certain Pretrial Requirements (the "*Scheduling Order*"), the District Court informed the parties that "the court intends to impose a reasonable limit on the time allowed for presenting evidence in this case," and asked the parties to provide an estimated length of trial. ARE1. Respondents did so, estimating that trial would last ten business days. ARE3. Petitioners (excluding Dale Sterritt, who failed to provide any estimate) estimated that trial would take a minimum of ten days. *Id.*

Relying upon the estimates, the District Court scheduled trial for ten days, and divided the approximately 52 hours available for the presentation of evidence equally between the plaintiffs and the defendants. 4SR1:5. Then,

when the defendants could not agree, the Court made a per capita allocation of the defendants' time. 4SR1:37.

B. Petitioners Did Not Use All the Time Allocated for the Presentation of Evidence.

Seeking to perpetuate the myth that the District Court unfairly limited each of them to 107 minutes for argument and the presentation of evidence, Petitioners obscure the fact that, when Dale Sterritt asked for an additional 60 minutes in which to present evidence, the District Court granted him 80 minutes. 2SR9:946,950; *see also* Petition at 14 & n.5. In addition, the so-called "RDSSR group" (which includes all of the Petitioners except Dale Sterritt) received 60 additional minutes from defendant Malcolm M. Kelso. 2SR8:871; 2SR11:1432.

And, all the Petitioners finally rested their cases *without exhausting their allocated time*. *See Monotype Corp. v. International Typeface Corp.*, 43 F.3d 443, 451 (9th Cir. 1994) (reversal required only if time limits constitute harmful error); *McKnight v. General Motors Corp.*, 908 F.2d 104, 115 (7th Cir. 1990) (same).

Furthermore, Petitioners never identified any witness who they would have called or any evidence that they would have presented had they been allowed more time. *See McKnight*, 908 F.2d at 114-15 (to preserve complaint about time limits, party must show what it would do with additional time); *Johnson v. Ashby*, 808 F.2d 676, 677 (8th Cir. 1987) (complaint about time limits waived by failure to make offer of proof). *See generally* FED. R. EVID. 103(a)(2) (offer of proof is necessary to preserve complaint about exclusion of evidence).

In this Court, Petitioners suggest that they were excused from identifying the witnesses or the evidence that they would have introduced because Dale Sterritt filed a pretrial exhibit list and a pretrial witness list.[5] *See* Petition at 21. However, neither of the lists identified the substance of the testimony that Sterritt hoped to elicit. As the District Court observed, Sterritt had not even participated in the preparation and filing of the joint pretrial order. *See* 4SR1:4-5, 39. The Court was not required to allow Sterritt additional time (when he had not exhausted his allotted time anyway) for "presenting witnesses if [it] [didn't] even know what defenses those witnesses [were] supposed to support." *Id.*

Finally, Petitioners' emphasis on the volume of Respondents' exhibits is disingenuous. *See* Petition at i ("over 1000 Plaintiffs' exhibits"), ii ("over 1000 trial exhibits"), 10 ("Respondents' 1039 trial exhibits"), 18 ("1039 trial exhibits").[6] Petitioners make a great show of detailing the number of exhibits that Respondents introduced to prove the land flips and other related-party transactions. *See* Petition at 20 & nn.11-15. They urge repeatedly that they needed more time to challenge these "very voluminous" documents. *See id.* at 19.

---

[5] Petitioners suggest, but do not explain, how an exhibit list or a witness list filed by Dale Sterritt preserved error for the RDSSR group. The RDSSR group also filed an exhibit list and a witness list. All the exhibits on its list were introduced into evidence, and the majority of the witnesses were called. The RDSSR group failed to issue any trial subpoena for the witnesses who were not called.

[6] Because it fails to account for gaps in the exhibit numbering, Petitioners' figure is exaggerated. Even counting multiple-part exhibits as separate exhibits, Respondents actually had 725 trial exhibits.

Yet, at trial, Petitioners never once attempted to refute the related-party character of the transactions. Indeed, during his closing argument, Dale Sterritt's lawyer *conceded* that the transactions were among related parties, and tried to convince the jury that Rahr still would have invested had he known that fact. 2SR12:1533. The lawyer for the other Petitioners, in his longer closing argument, did not even mention, never mind challenge, the related-party nature of the transactions.

In view of Petitioners' failure to suggest either to the District Court, or to the Fifth Circuit, or to this Court what evidence they would have introduced, if granted more time, to refute the overwhelming evidence that the challenged transactions were among related parties, and in view of their ultimate concession on that point, Petitioners' due process rights would not have been implicated even if Respondents had introduced 100,000 trial exhibits to prove the related-party nature of the transactions.

C. Petitioners Did Not Exhaust the Time Allowed for Closing Argument.

Petitioners also complain that they were given insufficient time to present closing argument. *See* Petition at 15-18. Petitioners fail to mention, though, that they failed to object or to request additional time at the conclusion of their respective arguments. *See United States v. Leal*, 30 F.3d 577, 586 (5th Cir. 1994) (to preserve objection to time limits, party must request additional time at the conclusion of argument); *United States v. Bernes*, 602 F.2d 716, 722 (5th Cir. 1979) (same).

Petitioners also fail to mention that Dale Sterritt did not use the full time allocated for his argument.

2SR12:1535. *See Bernes*, 602 F.2d at 722 n.9 (appellant must show actual prejudice from time allocation). Further, they obscure the fact that that the RDSSR group went almost twice as long as originally allocated. 2SR12:1572; *see also* Petition at 16 n.7.

D. Petitioners Obtained All the Discovery That They Sought.

Although not mentioned in their Questions Presented for Review, Petitioners complain that the District Court did not allow them sufficient time in which to conduct pretrial discovery. *See* Petition at 6-7. Petitioners claim that they were afforded only 45 days in which to conduct discovery. *See id.*

This claim simply is not true. Admittedly, Petitioners had 45 days after the District Court entered its Scheduling Order in which to *complete* discovery. *See id.* But, that does not mean that Petitioners had only 45 days in which to *conduct* discovery. Petitioners were not required to wait until the Court entered a Scheduling Order before they began discovery.

This case had been on file for more than 16 months before the District Court even entered the Scheduling Order. 4SR1:3; ARE1. It had been pending in the United States District Court for the Northern District of Texas for almost one year. R1:42. And, because the orders denying Petitioners' motions to dismiss came almost one month before the Scheduling Order, Petitioners were also free to use that time to conduct any discovery that they desired.

Moreover, Respondents agreed to extend the discovery deadline for two weeks, and provided dates for a number

of depositions that Petitioners demanded. R17:3647-714. Petitioners, however, never issued notices for many of those depositions, and they failed to appear for several of the depositions that were noticed. *See id.* Petitioners gave every indication in the District Court that they had conducted all the discovery that they desired. Certainly, they have never identified any specific discovery that they were unable to complete before the discovery deadline. *Cf. Martel v. County of Los Angeles*, 56 F.3d 993, 995 (9th Cir. 1995) (decision to deny continuance to obtain discovery will be disturbed only " 'upon the clearest showing [of] . . . actual and substantial prejudice' ") (quoting *Sablan v. Department of Fin.*, 856 F.2d 1317, 1321 (9th Cir. 1988)).

E. Sanctions That Were Never Imposed Did Not Violate Dale Sterritt's Rights.

Petitioners also complain (again, without any mention in their Questions Presented for Review) that the District Court improperly "sanctioned" Dale Sterritt for failing to participate in the joint pretrial order. *See* Petition at 8-9. In doing so, however, Petitioners fail to mention that the Scheduling Order specifically informed each party that sanctions would be imposed if such party failed to participate in the joint pretrial order. *See* R12:2807.

Additionally, on the first morning of trial, the District Court reversed itself, and announced that Dale Sterritt could participate in trial. *See* 2SR4:7. While Dale Sterritt now complains that this does not matter because, once the District Court announced the "sanction," he did not prepare, *see* Petition at 10, he made no such complaint in the District Court. In the District Court, Dale Sterritt never complained that he had been unable to prepare for trial

because the Court had announced at the pretrial conference that Sterritt would not be allowed to participate. *See Abbott v. Equity Group, Inc.*, 2 F.3d 613, 627 n.50 (5th Cir. 1994) (issue not raised before district court is waived).

Although Petitioners wish to pretend otherwise, this case presents no genuine due process concerns. A full and fair reading of the record reveals legitimate reasons for each of the District Court's actions. Further, to the extent this case ever could have been said to present due process concerns, those concerns are submerged in a sea of waiver. The Fifth Circuit's emphasis on waiver was no accident. *See* Petitioners' App. at 4a ("we find no error on the part of the District Court with respect to those issues not waived on appeal.").

II. This Case Does Not Present Any Novel or Important Question of Federal Securities Law.

In their second attempt to grab this Court's attention, Petitioners fashion "an important question of federal law that has not been directly settled . . . by this Court." *See* Petition at 29. Petitioners claim that this case raises the question of whether the doctrine of *in pari delicto* extends to bar a plaintiff from recovering under federal securities law for inside information that is repeated in public filings that contain cautionary statements. *See id.*

A. The Final Judgment Can Be Affirmed Without Relying on Federal Securities Law.

In seeking to entice the Court with a novel question of federal securities law, Petitioners seek to create the impression that this case was largely, if not wholly, based upon federal securities law. Petitioners fail to mention

that the Final Judgment entered in favor of CIC is not even based upon federal securities law. *See* RE7. The Final Judgment in favor of CIC is based solely upon Texas state law – specifically, the jury's findings that Petitioners breached and/or conspired to breach their state-law fiduciary duties to CIC. *See* RE5:4183-92.

Further, Petitioners neglect to mention that the Final Judgment entered in favor of Rahr is not based solely upon federal securities law. RE7. The jury did find that Petitioners committed securities fraud against Rahr, RE5:4151-61, but the jury also found that Petitioners committed Texas statutory fraud, conspired to commit Texas statutory fraud, and made one or more negligent misrepresentations to Rahr under Texas state law, RE5:4162-76. The Final Judgment is based upon those state-law findings as well as the federal securities law findings.

Ultimately, then, whether a claim under federal securities law is barred under the circumstances posed by Petitioners is immaterial to this case. Whether or not Rahr is entitled to recover under federal securities law, CIC and Rahr are entitled to recover under Texas state law. Whether or not this Court "render[s] judgment that Respondents take nothing for their claims under the Federal Securities laws," *see* Petition at 30, the Final Judgment must be affirmed.

B. Petitioners Cannot Rely upon the Doctrine of *In Pari Delicto*.

Petitioners also neglect to mention that they failed to preserve their arguments based on the doctrine of *in pari delicto*. In the District Court, Petitioners failed to propose

any questions related to their affirmative defense that could have been included in the jury charge. ARE5.

Further, this Court already has held that the doctrine of *in pari delicto* is unavailable to Petitioners – the very insiders who provided information to Rahr. *See Pinter v. Dahl*, 486 U.S. 622, 633 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 314 (1985).

C. The Record Does Not Even Support Petitioners' Alleged Defense.

Finally, the premise upon which Petitioners' argument is based is flawed. The jury's findings of securities fraud were not necessarily based upon the two "key" misrepresentations identified by Petitioners – *i.e.*, the misrepresentations (1) that CIC's stock would be listed on the NASDAQ exchange, and (2) that the Hole would be permitted as a landfill. *See* Petition at 25-29.

There were dozens of material misrepresentations, large and small, upon which the jury could have based its findings of fraud. *See* PX40. For example, the jury could have based its findings of fraud on Dale Sterritt's repeated misrepresentations that CIC was using Rahr's money for the legitimate business purpose of developing the Hole and securing a NASDAQ listing. 2SR8:689-96, 725-30; PX16:7, 17:3, 46. Or, the jury could have based its findings of fraud on the numerous false representations that CIC's assets were as represented on the balance sheet. 2SR6:410-23; 2SR7:7-11, 16-24; PX103, 109, 111, 144, 151-54, 156, 158, 258, 809:F-9, 816. Evidence of any one of the misrepresentations, none of which was subject to any cautionary statements, supported the jury's findings.

Hence, it does not matter whether the doctrine of *in pari delicto* bars a plaintiff from recovering under federal securities law for inside information that is repeated in public filings that contain cautionary statements. The Final Judgment can (and must) be affirmed based upon the numerous misrepresentations made by Dale Sterritt, which were not subject to any cautionary statements. Indeed, the Final Judgment can (and must) be affirmed based upon Petitioners' numerous violations of Texas state law.

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari presents no genuine issues worthy of United States Supreme Court review, and urge the Court to deny certiorari.

Respectfully submitted,

LAWRENCE J. FOSSI
Counsel of Record
STEPHANIE K. CRAIN
FOSSI & CRAIN
1113 Autrey Street
Houston, Texas 77006
(713) 529-4000

WILLIAM D. SIMS, JR.
ROBBI BROWNHILL HULL
MICHAEL L. RAIFF
VINSON & ELKINS, L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-7700

Attorneys for Respondents